

LETTER OPINION
98-L-29

March 24, 1998

Honorable Lawrence L. "Pete" Naaden
State Senator
PO Box 53
Braddock, ND 58524-0053

Dear Senator Naaden:

Thank you for your memorandum asking whether the Superintendent of Public Instruction can pay special education aid under N.D.C.C. § 15-40.1-07.6 to local school districts educating children from a dissolved school district for the school year immediately following the dissolution.

N.D.C.C. § 15-40.1-07.6 provides, in part:

1. [E]ach biennium the superintendent of public instruction shall distribute moneys appropriated by the legislative assembly for per student special education payments to each school district in the state on the basis of students in average daily membership. The superintendent of public instruction shall forward the payments, as calculated under subsection 3 of section 15-40.1-06, to eligible school districts in the same manner and at the same time that the superintendent distributes foundation aid payments. . . .

N.D.C.C. § 15-40.1-07.6(1).

That section requires payments to be made to eligible school districts on the basis of "average daily membership."

N.D.C.C. § 15-40.1-09 defines average daily membership as "the total days all students in a given school are in attendance, including two days set aside for the North Dakota education association instructional conference, three days listed in subsections 2 through 10 of section 15-38-04.1 which have been selected by the school board in consultation with the teachers, and up to two full days during which parent-teacher conferences are held, divided by one hundred eighty days." Under N.D.C.C. § 15-40.1-09, average daily membership is used in conjunction with fall enrollment to determine foundation aid payments. That section also provides:

Honorable Lawrence L. "Pete" Naaden
March 24, 1998
Page 2

. . . Per student aid as provided under sections 15-40.1-06, 15-40.1-07, and 15-40.1-08 must be computed on the basis of the previous year's average daily membership less the number of students attending school during the current school year in another district under the provisions of open enrollment or the current year's fall enrollment, whichever provides the greatest payment, for all current grade levels.

In Horst v. Guy, 219 N.W.2d 153, 157 (N.D. 1974), it was stated:

In construing statutes the courts must take judicial notice of the history of the terms employed and, where statutes have been in existence for a long period of time, it must be presumed that the Legislature has at all times been aware of the meaning originally attaching to those terms. . . .

219 N.W.2d at 157. Also, "[t]he legislature is presumed to know the construction of its statutes by the executive departments of the State and the failure to amend the statute indicates legislative acquiescence in that construction." Effertz v. North Dakota Workers Compensation Bureau, 525 N.W.2d 691, 693 (N.D. 1994).

Therefore, when the Legislature used "average daily membership" in N.D.C.C. § 15-40.1-07.6, it did so with knowledge that the term had specific meaning in the business of state aid to local school districts. Under N.D.C.C. § 15-40.1-09, the distribution of foundation aid is based on the current year's fall enrollment or the previous year's average daily membership, whichever produces the higher payment. However, N.D.C.C. § 15-40.1-07.6 provides for distribution of special education aid only on the basis of average daily membership. For purposes of distributing state aid under N.D.C.C. ch. 15-40.1, average daily membership is known only for school years prior to the current school year because that calculation is made after the close of each school year. N.D.C.C. § 15-40.1-09 requires school districts to file annual enrollment reports with county superintendents by July 15 after the close of the school year. Therefore, the average daily membership referred to in N.D.C.C. § 15-40.1-07.6 must necessarily mean the previous year's average daily membership.

"It is well-settled that public officials have only such authority as is expressly given them by the constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority." American Federation of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983).

N.D.C.C. ch. 15-40.1 provides specific authority for distribution of various forms of state aid to local school districts under a complicated formula using numbers appearing on certain forms filed with the Superintendent of Public Instruction. Nothing in that chapter gives the Superintendent of Public Instruction discretion to vary the terms of the statute to decide to pay an entity other than as provided in that chapter. It is therefore my opinion that the Superintendent of Public Instruction is not authorized to pay special education aid under N.D.C.C. § 15-40.1-07.6 to school districts receiving students from a dissolved school district for the school year immediately following the date of dissolution. The special education aid is payable only on the previous year's average daily membership, not current fall enrollment. The receiving school districts' average daily membership for the previous school year does not include students from the dissolved district. It is not within the implied authority of the Superintendent of Public Instruction to re-direct special education payments to school districts that receive students from a dissolved school district in the school year immediately following the dissolution. No criteria exists for redistributing special education aid to such school districts.¹

State aid to school districts for transportation is also calculated on numbers filed by school districts after the close of the school year. When it became apparent that transportation costs would go uncompensated under N.D.C.C. §§ 15-40.1-17 and 15-40.1-18 because of the closing of school districts, the Legislature responded in 1995 with the enactment of N.D.C.C. § 15-40.1-18.1. That section allows pro rata distribution of transportation payments by the Superintendent of Public Instruction to districts receiving students

¹ If a school district dissolution's effective date is delayed by the county committee for the reorganization of school districts under N.D.C.C. § 15-27.4-01 to a date after July 1, the payment procedure under N.D.C.C. § 15-40.1-05 would require the Superintendent of Public Instruction to pay the initial payments due under that section until the effective date of dissolution. This is so because the first four payments in the system under N.D.C.C. § 15-40.1-05 are automatic payments based only on the amounts the school district was paid the previous year. I understand it has become the policy of the Department of Public Instruction to recommend an August 15 effective date for dissolutions. That policy would result in two payments for special education aid being made to a dissolving school district. However, because no special education unit would be providing services to the dissolving district for the current school year, that money would be distributed under N.D.C.C. §§ 15-27.4-02.1 or 15-27.4-03.

Honorable Lawrence L. "Pete" Naaden
March 24, 1998
Page 4

from a closed school district. The Legislature may wish to consider similar ameliorating legislation for special education payments under N.D.C.C. § 15-40.1-07.6.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg
cc: Dr. Wayne G. Sanstead, Superintendent of Public Instruction